STATE OF MICHIGAN

IN THE SUPREME COURT

CARSON FISCHER, PLC,

Plaintiff-Appellee,

vs.

MICHIGAN NATIONAL BANK and MICHIGAN NATIONAL CORPORATION,

Defendants-Appellants.

Supreme Court No. 128689

Court of Appeals No. 248167

Lower Court No. 01-029814-CZ
Oakland County Circuit Court
Hon. Rudy J. Nichols

BRIEF ON APPEAL OF DEFENDANTS-APPELLANTS MICHIGAN NATIONAL BANK AND MICHIGAN NATIONAL CORPORATION

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

The Court of Appeals issued its Opinion on February 8, 2005. Michigan National timely moved for rehearing. The Court of Appeals denied the motion for rehearing on March 31, 2005. Michigan National filed Application for Leave to Appeal on May 12, 2005. This Court granted the Application on December 28, 2005.

QUESTIONS PRESENTED FOR REVIEW

I. Whether the claim of Carson Fischer P.L.C. ("Carson Fischer"), as a Bank customer, to recredit its account, is precluded under MCL 440.4406(6), and the parties' Account Agreement, by Carson Fischer's undisputed ten-year failure to discover and report to the Bank any "unauthorized signature," discrepancy, improper charge or "any alteration" "on the items" either within the one year period of UCC § 4406(6) or within the shorter period to which Carson Fischer agreed in the Account Agreement.

The Court of Appeals answered no, reasoning that "alterations" or forgeries were not involved in this case, and neither UCC § 4406 or the Account Agreement imposed a duty to discover this scheme.

Appellant Bank answers yes, for the reason that the record indisputably showed, and Carson Fischer admitted, that Carson Fischer's claims asserted forgery, or alteration of checks under MCL 440.3407, and that Carson Fischer's bank statements and returned items showed discrepancies and improper charges.

II. Whether MCL 440.4406(6) preclusion, as properly expanded by the Account Agreement, which applies "without regard to care or lack of care by the customer or the bank....," applies to bar a claim for undiscovered and unreported payments based on unauthorized signatures, discrepancies, improper charges or alterations even if it is assumed that the unauthorized payment scheme is not "readily apparent."

The Court of Appeals answered no.

Appellant answers yes, for the reason that there is no such statutory requirement of "readily apparent" and the bar of UCC § 4406(6) and the Account Agreement applies "without regard to care or lack of care" of either the customer or the Bank. *Siecinski v First State Bank*, 209 Mich App 459 (1995).

III. In the alternative, if the Carson Fischer checks in theory had no unauthorized signature or alteration, and if there were no discrepancies or improper charges with respect to the Carson Fischer accounts, whether the checks were properly payable by the Bank under MCL 440.4401.

The Court of Appeals did not address this question.

Appellant answers that, in theory, the answer is yes.

IV. Whether MCL 440.4406(6)'s and the Account Agreement's preclusion effect applies to all Carson Fischer's claims, regardless of the theory alleged.

The Court of Appeals answered no.

Appellant answers yes. *Siecinski, supra.*

CONCISE STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

A. Material Proceedings

This is an action by Carson Fischer, a Birmingham, Michigan law firm, against its bank, Michigan National, for damages incurred due to embezzlement by Carson Fischer's own employee. On February 23, 2001, Carson Fischer filed a complaint in Oakland Circuit Court seeking over $5 million from Michigan National. Complaint (3a-13a). At that point, Carson Fischer and its fraud investigator had been investigating the embezzlement since October 26, 2000. Robert Carson Dep at pp 58-61 (87a); Harry Cendrowski Dep at pp 87-89. (262½a).[1] The Complaint alleged that Carson Fischer's office manager Chip Rasor ("Rasor") obtained Carson Fischer checks payable to Michigan National and used them to pay his personal loans. Complaint, ¶¶34, 35. (9a). The Complaint contained five counts: (1) Aiding and Abetting Conversion; (2) Aiding and Abetting Breach of Fiduciary Duty; (3) Action to Recredit Drawer's Account; (4) Claim to Proceeds In Wrongfully Negotiated Instruments; and (5) Liability of Michigan National Corporation. (*Id.*) Count III alleged as follows:

"50. As part of the Fraudulent Scheme, *Rasor presented checks with forged signatures or endorsements to Michigan National*, and Michigan National charged those checks to the Firm's accounts, even though the checks were not properly payable.

51. The checks were not properly payable because (1) the persons signing those checks as or on behalf of the drawer did not intend payment to Rasor, and (2) Michigan National made payment on the checks without endorsement.

52. Michigan National was not permitted to charge against the Firm's accounts checks that are not properly payable.

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[1] Hereafter "Carson" and "Cendrowski." Because so much of the Appendix is subject to Protective Order (353a) it was filed under seal.

53. Michigan National is obligated to recredit the Firm's accounts for the unauthorized payment of the checks..." Complaint, ¶¶ 50-53 (11a) (emphasis added).

Following discovery, in view of the allegations that checks were not properly payable because of forged signatures, Michigan National moved for summary disposition pursuant to MCR § 2.116(C)(10) on the grounds that, under MCL 440.4406(6) of the Uniform Commercial Code ("Code"), the parties' Account Agreement, and *Siecinski v First State Bank of East Detroit*, 209 Mich App 459, 464; 531 NW2d 768, *lv den*, 450 Mich 951 (1995), all of Carson Fischer's claims were limited to damages sustained after September 1, 2000. (209a-227a). Michigan National argued that § 4406(6) expressly and absolutely precludes claims asserting an unauthorized signature or alteration on a check if such signature or alteration is not reported within one year after the check or bank statement is made available to the customer. (217a-221a). Section 4406(6) states:

> (6) Without regard to care or lack of care of either the customer or the bank, a customer who does not within 1 year after the statement or items are made available to the customer (subsection (1)) discover and report his or her unauthorized signature on or any alteration on the item is precluded from asserting against the bank the unauthorized signature or alteration. If there is a preclusion under this subsection, the payor bank may not recover for breach of warranty under section 4208 with respect to the unauthorized signature or alteration to which the preclusion applies.

The Account Agreement between Carson Fischer and Michigan National (132a-138a) modifies § 4406(6) by shortening the notification period, and by requiring Carson Fischer to provide notification not only of unauthorized signatures and alterations, but also improper charges, and discrepancies (134a). The Account Agreement states:

> You [Carson Fischer] agree to promptly examine your statement and, if applicable to your account, all canceled checks contained with your statement, and to notify the Bank of any discrepancies, forgeries, or improper charges to your account within thirty (30) days after the Bank mails or otherwise makes your statement available to you. If you do not so notify the Bank of any discrepancies, forgeries, alterations, or improper charges to your account, your claim will be absolutely barred and waived.

Account Agreement (134a).[2] Michigan National argued further that under *Siecinski*, *supra*, the notice requirement of § 4406(6) applied not only to all of Carson Fischer's claims under the UCC, but also to claims purportedly outside of the UCC, including negligence and conversion claims. (226a). *See Siecinski*, 209 Mich App at 464-465.

In opposing the motion, Carson Fischer argued, among other things, that § 4406(6) does not apply to its claims because its theories of liability do not assert unauthorized signatures or altered instruments as those terms are used in § 4406(6). (247a-249a). Michigan National replied, identifying specific paragraphs of the Complaint, Carson Fischer's admissions, and Carson Fischer's response brief, in which Carson Fischer made unauthorized signature and alteration claims. Michigan National further argued that Carson Fischer could not contradict its allegations and admissions in order to avoid summary disposition.

The trial court granted partial summary disposition in favor of Michigan National, November 27, 2002 Order (304a-320a). The trial court noted the detailed allegations of forgery and held, under *Atkinson v Detroit,* 222 Mich App 7 (1997), that Carson Fischer could not contradict its allegations in order to avoid summary disposition. (308a).

The trial court based its decision on § 4406(6) and the Account Agreement. It noted Carson Fischer's failure, in light of the record, to "refute its own admissions and the applicability of MCL 4406(6)." (309a). It held that damages on all of Carson Fischer's claims were limited to those checks listed in Carson Fischer's post-notification bank statements, that is, those after September 1, 2000. (310a). The trial court also granted summary disposition to Michigan

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[2] Such modifications are authorized by MCL 440.4103, which states:

> The effect of the provisions of this article may be varied by agreement but the parties to the agreement cannot disclaim a bank's responsibility for the lack of good faith or failure to exercise ordinary care or limit the measure of damages for lack or failure. However, the parties may determine by agreement the standards by which the bank's responsibility is to be measured if those standards are not manifestly unreasonable.

National on Carson Fischer's aiding and abetting claims. Carson Fischer appealed both of these issues to the Court of Appeals. Claim of Appeal (324a-328a).

The Court of Appeals affirmed judgment on the aiding and abetting claims, but reversed as to the § 4406(6) preclusion or limitation of damages defense, holding that Carson Fischer may have a claim under MCL 440.4401 ("Section 4401") because Michigan National may have allegedly improperly charged the embezzled checks against Carson Fischer's account. Feb 5, 2005 Opinion (334a). The Court of Appeals held that the trial court had erred in applying § 4406(6) to this case; it concluded that § 4406(6) applies to forgery and alteration of checks, but held the present case "does not involve forgery or alteration of checks." (335a). The Court of Appeals went on to hold:

> Neither § 4406 nor the account agreement creates a duty for the customer to discover the type of scam involved here. Carson Fischer's comparison of bank statements with its own records would not enable Carson Fischer to readily discover the fraud because Carson Fischer's own records would reveal that the checks were in fact written to Michigan National Bank. Nothing in the information contained in the bank statement would reveal the account to which the proceeds of the check were applied. Under these circumstances, neither § 4406 nor the parties' account agreement limit Michigan National's liability to the time period following notification of the embezzlement scheme to Michigan National. The trial court therefore erred by concluding that Michigan National's liability was limited by § 4406(6) to those checks listed in Carson Fischer's post-notification bank statements after September 1, 2000.

(*Id.*)

Michigan National moved for reconsideration of this Opinion, which the Court of Appeals denied in a one-line Order. (341a). Michigan National then applied for leave to appeal (343a), and sought reversal of the February 8, 2005 Opinion and the March 31, 2005 Order.

On December 28, 2005, this Court granted Michigan National's Application for Leave to Appeal, and directed that in addition to others the parties' Briefs address two issues—whether

the insertion of Rasor's loan number on the checks was an alteration, and whether, if there were no unauthorized signatures or alterations, the checks were properly payable. Order (344a).[3]

B. Material Facts

1. *Rasor's Role at Carson Fischer*

This action involves checks handled by plaintiff's office manager over a ten-year period. Rasor was employed by Carson Fischer as its office manager from approximately 1990 to October 30, 2000. Complaint at ¶16. (6a). Although Rasor submitted a resume, Carson Fischer did not perform a background check. Carson Dep at pp 38-39 (86a). Carson, the managing partner who reviewed Rasor's resume, admitted that most of the resume information, including Rasor's Albion College undergraduate degree and MBA from the University of Michigan, was false. Carson Dep at pp 37, 38, (85a-86a); 209-211 (95a-96a); 224 (98a). Carson later learned that Rasor did not attend college and had a criminal record that predated his employment at Carson Fischer. *Id.* at pp 38 (86a), 224-225 (98a). No one at Carson Fischer checked Rasor's criminal record before Rasor was hired. *Id.* at p 38 (86a). Nevertheless, Rasor was given almost total control of all of Carson Fischer's financial transactions. Rasor collected and deposited Carson Fischer assets, paid its bills and prepared its financial statements. Complaint, ¶18 (6a).

When Rasor began displaying a lavish lifestyle shortly after he was hired, it was assumed that he had received an inheritance. Carson Dep at pp 203-204. (94a). Rasor's luxury automobiles, boats, frequent vacations in Florida (where he owned vacation property), and his Birmingham and Bloomfield Hills residences apparently raised no concerns. *Id.* at pp 203, 206 (94a, 95a), 213 (96a), 263-264 (99a). Carson even sold an expensive boat to Rasor, which was named "Conspicuous Consumption." *Id.* at p 208. Rasor financed his extravagant lifestyle by embezzling several millions of dollars from Carson Fischer for over 10 years.

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[3] These issues are directly addressed at Arguments, I-E, pp 26-30, and III (pp 43-47), *infra*.

2. *Rasor's Embezzlement Scheme*

Early during Rasor's employment, at the time Carson Fischer was indebted to Michigan National Bank, Rasor was authorized to prepare, but not sign, checks payable from Carson Fischer to Michigan National Bank to pay debts owed Michigan National Bank and to pay withholding tax deposits. Carson Dep at 415-416 (108a). The firm also maintained three checking accounts at Michigan National: (i) a "payroll" account to pay wages, federal and state tax withholding liability, and FICA deposits; (ii) a general account (called "GA1") used for recurring business operation expenses, not involving payroll or trust matters, on which Robert Carson and Joseph Fischer were signatories; and (iii) a second general account (called "GA2") designated as a client cost advance account for costs not exceeding $1,000, on which other attorneys could sign if Carson and Fischer were not available. Wanger Dep at 29-30 (229a-230a). Carson Fischer established account (GA2) for this limited purpose as a way to supervise, control and manage activity in the account where those who were not principals of Carson Fischer had signatory authority. Carson Dep at 88 (89a). Carson decided not to allow tele-transfer of funds into GA2; it was to be funded by check so that one of the principals of Carson Fischer would know when the account was funded. Carson Dep at 88 (89a). Carson testified he thought there were tele-transfers of funds into GA2 even though there was no authority for it. *Id.*

As office manager, Rasor prepared checks and deposits, made payments, and reviewed account statements. Complaint, ¶18 (6a). Over time, the Michigan National loan was paid off by Carson Fischer. Cendrowski Dep at 130-131, 140-141 (263a; 264a). Further, payment of payroll withholding liability was changed to direct deposit to a Chicago depository, via electronic funds transfer, which was substituted for the manual check deposit system. *Id.* at 139-140 (264a).

The ten-year embezzlement scheme was effected as follows. Rasor would prepare checks drawn on Carson Fischer's Michigan National checking accounts (usually from the

Carson Fischer GA2 account intended to be used only for client-costs not exceeding $1,000). He initially made the checks payable to Michigan National, ostensibly to pay Carson Fischer's withholding tax liability (the "MNB Checks"). Cendrowski Dep at pp 130-131 (263a), 139-140 (264a), 187 (269a). Rasor then either forged the signature of a signatory to the MNB check or had it signed by an account signatory. Carson Dep at pp 417-418 (108a), 441 (109a). Rasor also changed the check by inserting his personal loan account number on the face of the MNB Check; it is unknown whether Rasor's loan account number was put on the check before or after a signature was placed on the checks. *Id.* at pp 440-442 (109a).[4] Rasor then presented the MNB Checks for deposit to his personal loan account indicated by the account number on the face of the check. Complaint, ¶¶34-35 (19a); Carson Fischer Admissions at ¶¶24, 30, 32 (71a-74a).

In the circuit court, Carson Fischer admitted that the MNB Checks contained unauthorized signatures, adding that they arguably were forged. Carson Fischer Admissions at ¶32. (75a). Carson Fischer's Complaint also specifically alleged that the MNB Checks were forged and not properly payable:

> 50. As part of the Fraudulent Scheme, Rasor *presented checks with forged signatures or endorsements to Michigan National*, and Michigan National charged those checks to the Firm's accounts, even though *the checks were not properly payable.*

Complaint at ¶50 (11a) (emphasis added).

Rasor's embezzlement ultimately was discovered, but not via a report of the unauthorized signatures or alterations to Michigan National by Carson Fischer. Rather, in October 2000, Michigan National was contacted by a Michigan Secretary of State investigator who reported that Rasor had tried to use several different driver's license numbers while purchasing a Bentley automobile. Carson Dep at pp 60-61 (87a). Michigan National advised Carson Fischer of the investigation, which led to the discovery of Rasor's embezzlement. Complaint at ¶13. Carson

[4] *See* MCL 440.3110(3)(a) for the effect of adding Rasor's account number.

Fischer then commenced an action against Rasor and obtained a final judgment against him. Complaint at ¶13 (5a). Rasor was later convicted of bank fraud and sentenced to federal prison. Cendrowski Dep at p 234 (273a).

3. *Carson Fischer's Failure To Discover And Report Any Improper Payments Based On Unauthorized Signatures, Discrepancies, Improper Charges, And Altered Items To Michigan National*

In the regular course of business, Michigan National sent not only monthly account statements but also cancelled checks to Carson Fischer. Bunn Affidavit (117½a). Under § 4406(3) of the Code, when such statements and checks (or "items") are made available, a bank customer is required to exercise reasonable promptness in examining the statement and the items to determine whether any payment was not authorized because of an alteration on an item or because a purported customer signature was not authorized. MCL 440.4406(3). In addition, in accordance with its Account Agreement, Carson Fischer was obligated to review its monthly bank statements and canceled checks promptly and report any "discrepancy, forgery, alteration or improper charge" within 30 days of the mailing of the bank statement:

> You [Carson Fischer] agree to promptly examine your statement and, if applicable to your account, all canceled checks contained with your statement, and to notify the Bank of *any discrepancies, forgeries, or improper charges to your account within thirty (30) days after the Bank mails or otherwise makes your statement available to you. If you do not so notify the Bank of any discrepancies, forgeries, alterations, or improper charges to your account, your claim will be absolutely barred and waived.*

Bunn Affidavit at ¶¶10, 13, 15; (118a-119a); Account Agreement, attached as Ex. D to the Bunn Affidavit, emphasis added (134a).

Despite being regularly provided with monthly bank statements and canceled checks, Carson Fischer reported no unauthorized signature, improper charge, discrepancy, forgery or alteration until October 26, 2000. Carson Fischer Admissions at ¶18 (68a).

4. *Carson Fischer Failed To Discover And Report Improper Payments In Spite Of The Information Provided*

Carson Fischer had numerous opportunities to notice Rasor's scheme. The three Carson Fischer checking accounts with Michigan National had distinct internal functions. (1) The payroll and payroll withholding account was used to keep payroll funds separate and pay wages and withholding liabilities. Carson Dep at pp 85-86 (88a-89a), 99-101 (91a). Carson described doing so as "a good accounting practice" that would be "easier to maintain and remain secure." Carson Dep at pp 86 (89a). (2) The general checking account ("GA1") was used for Carson Fischer's large, recurring operating and daily expenses, except payroll and trust matters (only Robert Carson and Joseph Fischer were authorized to sign GA1 checks), Wanger Dep at pp 26-28 (229a); Carson Dep at p 87 (89a). (3) The second general account ("GA2") was a client cost advance account on which other attorneys could sign checks for client costs not exceeding $1,000 when Carson and Fischer were not available to sign checks. *Id.* Wanger Dep at pp 29-30 (229a-230a). As noted before, Carson Fischer established this account (GA2) for this limited purpose as a way to supervise, control and easily review activity in the account where those who were not principals of Carson Fischer had signatory authority. Carson Dep at 88-89 (89a). Carson wanted less transaction activity in GA2 so that it would be easier to track. Carson Dep at 92-93 (90a).

GA2 was the account primarily used in Rasor's embezzlement. The checks were written in large amounts (most in excess of $17,000); *see* 12-14, *infra.* Consistent, however, with Carson Fischer's policy that GA2 be used only for client costs of less than $1,000 when Fischer and Carson were unavailable to sign checks, and with the policy that GA2 was not to be funded via tele-transfer, the GA2 account (1) should not have had checks drawn on it for more than $1,000 (Wanger Dep at pp 29-30 (229a-230a); (2) should not have had checks drawn on it that purportedly were signed by Joseph Fischer (*Id.* at pp 29-30; Carson Dep at p 92 (90a)); (3)

should not have had deposits into it via tele-transfers from Standard Federal Bank, Carson Dep at 88 (89a); (4) should not have been used frequently or had much activity (*Id.*) (5) should not have experienced cancelled checks that recited Rasor's personal loan number on the face of the checks (*see*, for example, samples of GA2 bank statements and returned checks (197a-208a)); and (6) should not have been used to write checks to Michigan National Bank in connection with payroll withholding because there was a separate payroll account and Carson Fischer's payroll taxes were paid by electronic fund transfer (Cendrowski Dep at pp 130-131 (263a), 139-140 (264a), 187 (269a)). All this information was apparent on the monthly statements, cancelled checks and items made available. In addition, if Carson Fischer, as alleged did not intend the checks to be paid to Rasor's account number shown on their face, but intended them to be paid to some other Carson Fischer account, Carson Fischer could have checked its account statements to reconcile transfers (Carson Dep, 344a) and assure that its own accounts were credited. (104a).

Carson Fischer did not promptly examine its GA2 bank statements or cancelled checks for these items; as to GA2, Carson checked it infrequently. Carson Dep. at 89 (89a). It was Carson's job to review bank statements. Wanger at 32-33 (230a). Carson got cancelled checks all the time with numbers on them or little strips of paper on the bottom, but he never reconciled those numbers to whatever was going on. Carson at 100-101 (91a). While testifying about his review of bank statements received from MNB, in particular the statements for GA1, Carson testified: "When I looked at the cancelled checks, I was trying to determine whether there was something out of the ordinary." Carson at p. 315 (103a). But Carson did not keep a close eye on GA2 to see the activities going on in there both through check and through other matters. Theoretically there was no activity going on in that account. Carson at p. 89 (89a). Carson stated with respect to GA2 "I checked it infrequently because I had been told that there were no

circumstances where it had been used." Carson at 89 (89a). Carson was told this by Carson Fischer personnel, including Rasor. Carson at 89-90 (89a-90a).

Nonetheless, month-after-month and year-after-year, Carson Fischer's bank statements and canceled checks (e.g., 198a-201a) revealed what were described by Carson Fischer's accountant expert as "red flags," *id.* at p 155 (265a), as follows:

1. Checks were payable to Michigan National "for 1 1 090 0021659" (Rasor's personal loan account number) typed or written on the face. (199a-201a) (Sample, reproduced, *infra,* p 14);

2. The signatures of account signers varied significantly from check to check (199a-201a) – to the extent that one signer could not and cannot now tell if a signature was his own. "While they appear, they may not be my signature." Fischer Dep at pp 94 to 95 (115a).

3. The amounts payable exceeded the amounts Carson Fischer expected to be paid out of the accounts. Of the 229 checks identified as being involved in Rasor's embezzlement, 156 were written out of GA2, generally at the rate of 2 to 3 checks per month, often in excess of $17,000 per check, even though Carson Fischer intended GA2 checks to be under $1,000. *See* Embezzled Check Summary (348a-352a).[5] GA2 was to be used for checks "less than $1,000." The account "was established for emergency purposes... the intent was for motion fees, primarily, which had to be paid when either Carson or Fischer were not available." Wanger at 29-30 (229a-230a).

4. Large sums were transferred in and out of GA2, even though "theoretically there was no activity going on in that account." Carson Dep at pp 88-89 (89a). (Carolyn Bunn Affidavit, Exhibit F, 198a; 185a).

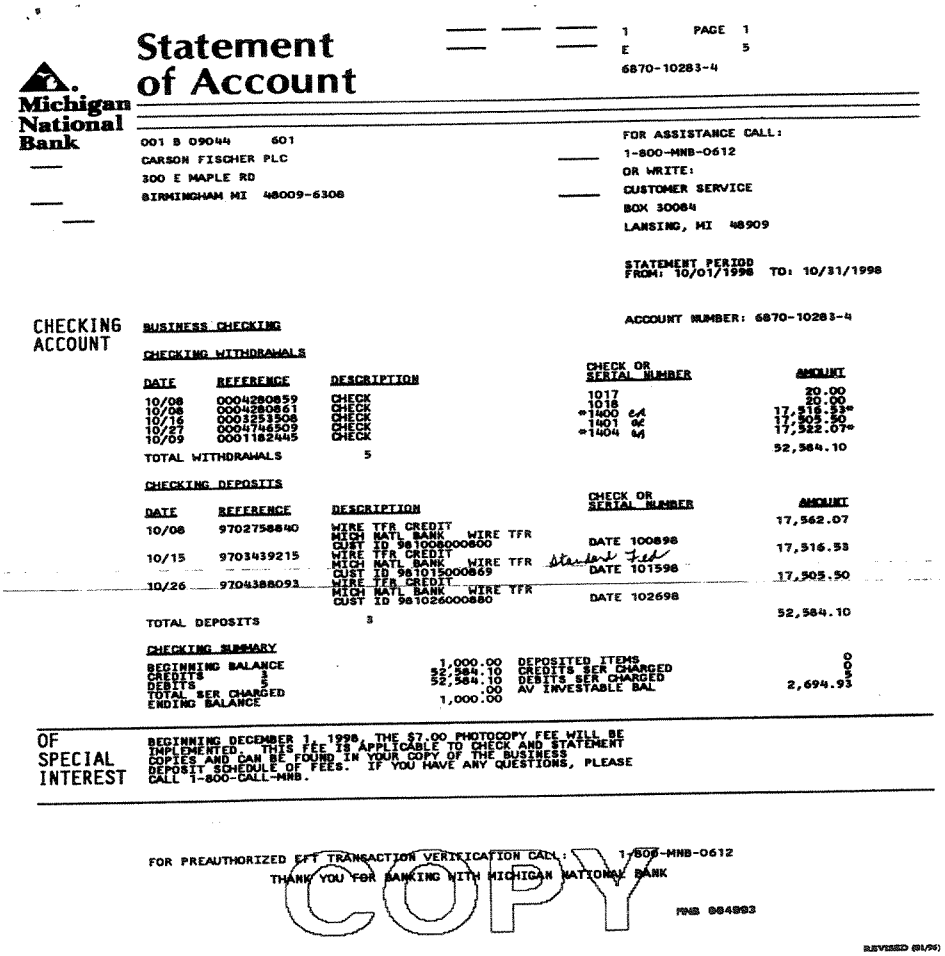
   GA2 was intended to be funded by check, but, as the statements showed, the funds transferred into GA2 were done by wire transfers (198a), and Rasor did not have authority to wire transfer funds. GA2 was "not an account that was funded under tele-transfer authority" (89a). It was to be funded by check "and one of [the principals of Carson Fischer] would know when the account was funded." Carson testified he thought, "tele-transfers were made into that account even though there was no tele-transfer authority for it." Carson at p 88 (89a).

[5] In accordance with MRE 1006, a summary of the checks used in the embezzlement (Embezzled Check Summary) (348a-352a), was submitted in the trial court with Michigan National's reply brief in support of motion for partial summary disposition. No objections regarding the Embezzled Check Summary were raised.

5. Most GA2 checks purportedly were signed by Joseph Fischer (see 199a-201a), even though that particular account was intended to be used only in his or Carson's absence. "... in circumstances where we weren't around, there were other people who could sign on general account Number 2." (Embezzled Check Summary (348a-352a); Carson Dep at pp 87-89 (89a)).

6. A representative sample of GA2 bank statements and canceled checks for January 1996, February 1997, and October 1998 revealed "red flags" such as: (a) checks for more than $17,000; (b) checks that were out of sequential order; (c) checks that exceeded typical client costs; and (d) checks that were atypical and contrary to the purpose of GA2. Cendrowski Dep at pp 176-179 (266a-267a), 181-182 (267a-268a), 193-195 (270a-271a), 203 (203a)).

A typical GA2 bank statement for October, 1998, (Bunn Aff., 198a), sent to Carson Fischer pursuant to § 4406 and the Account Agreement, is included in the Addendum and depicted below:



Statement of Account

1 PAGE 1
E 5
6870-10283-4

Michigan National Bank

001 B 09044 601
CARSON FISCHER PLC
300 E MAPLE RD
BIRMINGHAM MI 48009-6308

FOR ASSISTANCE CALL:
1-800-MNB-0612
OR WRITE:
CUSTOMER SERVICE
BOX 30084
LANSING, MI 48909

STATEMENT PERIOD
FROM: 10/01/1998 TO: 10/31/1998

ACCOUNT NUMBER: 6870-10283-4

CHECKING ACCOUNT

BUSINESS CHECKING

CHECKING WITHDRAWALS

DATE	REFERENCE	DESCRIPTION	CHECK OR SERIAL NUMBER	AMOUNT
10/08	0004280859	CHECK	1017	20.00
10/08	0004280861	CHECK	1018	20.00
10/16	0003253508	CHECK	*1400	17,516.53*
10/27	0004746509	CHECK	*1401	17,505.50
10/09	0001182445	CHECK	*1404	17,522.07*
TOTAL WITHDRAWALS		5		52,584.10

CHECKING DEPOSITS

DATE	REFERENCE	DESCRIPTION	CHECK OR SERIAL NUMBER	AMOUNT
10/08	9702758840	WIRE TFR CREDIT MICH NATL BANK WIRE TFR CUST ID 981008000600	DATE 100898	17,562.07
10/15	9703439215	WIRE TFR CREDIT MICH NATL BANK WIRE TFR CUST ID 981015000869	DATE 101598	17,516.53
10/26	9704388093	WIRE TFR CREDIT MICH NATL BANK WIRE TFR CUST ID 981026000880	DATE 102698	17,505.50
TOTAL DEPOSITS		3		52,584.10

CHECKING SUMMARY

BEGINNING BALANCE	1,000.00	DEPOSITED ITEMS	0
CREDITS 3	52,584.10	CREDITS SER CHARGED	0
DEBITS 5	52,584.10	DEBITS SER CHARGED	0
TOTAL SER CHARGED	.00	AV INVESTABLE BAL	2,694.93
ENDING BALANCE	1,000.00		

OF SPECIAL INTEREST

BEGINNING DECEMBER 1, 1998, THE $7.00 PHOTOCOPY FEE WILL BE IMPLEMENTED. THIS FEE IS APPLICABLE TO CHECK AND STATEMENT COPIES AND CAN BE FOUND IN YOUR COPY OF THE BUSINESS DEPOSIT SCHEDULE OF FEES. IF YOU HAVE ANY QUESTIONS, PLEASE CALL 1-800-CALL-MNB.

FOR PREAUTHORIZED EFT TRANSACTION VERIFICATION CALL: 1-800-MNB-0612
THANK YOU FOR BANKING WITH MICHIGAN NATIONAL BANK

COPY

MNB 984893

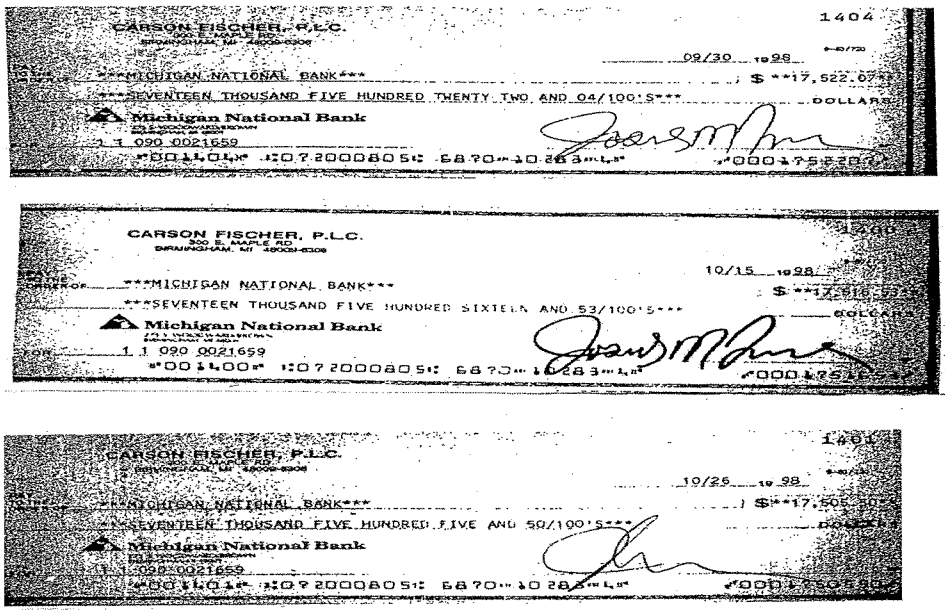
REVISED (01/96)

This GA2 bank statement for the month of October, 1998, like others mailed to Carson Fischer during the 1990's, reflects total deposits and total withdrawals amounting to over $52,000 each, well in excess of the GA2 limited activity intended by Carson Fischer. Carson Dep at pp 87-89 (89a); 91-93 (90a); Wanger Dep at pp 29-30 (229a-230a). The statement shows three separate wire transfers, each one in excess of $17,000. Carson testified he did not "keep a close eye on GA2 to see the activities going on in there both through check and other matters." Carson Dep at pp 89 (89a). Carson also testified though, that when he did review bank statements, he "did not look at the statement to see whether tele-transfers were there." Carson Dep at pp 400 (106a).

In the above sample, check numbers 1017 and 1018 were for $20, amounts Carson Fischer would expect to see for client costs. Each of three other checks, numbered 1400, 1401 and 1404, out of sequential order from the $20 checks, was for more than $17,000, an amount which far exceeded Carson Fischer's intended $1,000 client cost limit for GA2.

In addition to the monthly statements, pursuant to § 4406 and the Account Agreement, canceled checks, like those depicted below, were also sent to Carson Fischer on a monthly basis. Bunn Affidavit (117a-118a).

Copies of three October 1998 checks returned to Carson Fischer with the statement are at 199a-201a and included in the Addendum. They are reproduced here.



Each of these checks, like most of the checks returned to Carson Fischer, contained "red flags." Cendrowski Dep at pp 155 (265a), 176-179 (266a-267a), 192-194 (270a-271a), 203 (272a). Although GA2 checks were to be signed in the absence of Fischer or Carson, Carson Dep at 87 (89a), each of these contained the purported signature of Joseph Fischer. The signatures themselves, dated within a month of each other, obviously vary from check to check. The checks were out of sequential and chronological order, the September 30, 1998 check is No. 1404, the October 15, 1998 check is No. 1400 and the October 26, 1998 check is No. 1401. Each check has the Rasor personal loan account number legibly typed in the memo section on the face of the check, that is, "For 1 1 090 0021659." (199a-201a). Although the GA 2 account was intended to pay client costs, primarily motion fees, Wanger at 29-30, (229a-230a) the checks were not payable to a court, court reporter, delivery service, etc. (*Id.*)[6] Thus, in this instance, it

[6] The reasons for writing checks to Michigan National for any reason had ceased to exist.

would and should have been readily apparent to a person reviewing the checks, that three checks had been written for that account number in less than 30 days, each check in excess of $17,000.

It is undisputed that during the 10-year period of Rasor's embezzlement and while the Account Agreement was in effect, Carson Fischer received regular, monthly bank statements and canceled checks for GA2 like those depicted above. Bunn Affidavit, ¶¶8, 13, 14, 15, 20 (117a-119a). Carson Fischer admitted that "it received checks written on the Firm's MNB accounts, after cancellation, on a regular basis" and Carson Fischer possessed many of the bank statements. Carson Fischer Admissions at ¶¶10, 14 (64a-66a). As provided by MCL 440.4406(1), the Carson Fischer bank statements provided sufficient information by describing each item by "item number, amount, and date of payment." Bunn Affidavit at ¶¶7, 19 (117a, 119a). The cancelled checks provided additional information such as the date written, the payee, the signature, and other information.

Cendrowski testified that during his investigation he learned that Carson Fischer had changed from paying payroll withholding by check to paying it by electronic funds transfer per IRS regulations. Thus, there would not be checks payable to Michigan National for that purpose. Cendrowski at 138-139 (264a); at 155 (265a). With respect to the bank statement for 1/1/96-1/31/96 that Cendrowski was shown as referenced above, he concluded that payments to Michigan National should not have been made by check from GA2 and should not have been made by check from the Carson Fischer payroll account for withholding tax purposes because Carson Fischer was making EFT payments from payroll. Cendrowski at 188 (269a).

Notwithstanding having all this information (the bank statements and the cancelled check items) made available to it, Carson Fischer did not report any improper payment or unauthorized signature, forgery, alteration, discrepancy or improper charge to Michigan National until October 26, 2000.

SUMMARY OF ARGUMENT

Part 4 of Article 4 of the Uniform Commercial Code ("Code"), as adopted in Michigan, contains detailed provisions governing the "Relationship Between Payor Bank And Its Customer," § 4401-§ 4407. These are finely tuned, highly detailed provisions enacted to prescribe a bank and its customer's rights and responsibilities to each other, to facilitate commercial transactions, and to provide certainty and finality. The Code details what items are properly payable, provides for banks to make available to customers certain information, describes the duties and liabilities of the bank and the customer where that information is made available, and provides specific preclusion defenses to a bank when claims of improper payment are made.

If an item is properly signed, authorized by the customer and in accordance with the customer agreement, and is not altered, it is properly payable and may be charged against the customer's account. § 4401. If an item contains an unauthorized signature or alteration, it is not properly payable. However, the Code, and the parties' Account Agreement, prescribe in detail the consequences to the customer, and the defense for a bank, where a customer fails within a year (or 30 days) to report improper charges, unauthorized signatures or alterations on statements or items made available to him. Section 4406(3) requires that customers discover and timely report any unauthorized payment based on unauthorized signature (including forgery) or alteration in order to claim wrongful payment of checks. Section 4406(6) and the parties' Account Agreement provide a preclusion defense; if customers do not report such matters within one year (30 days under the Account Agreement), customers are precluded from asserting the unauthorized signature (including forgery), discrepancy, improper charge, or altered items against the bank. Section 4406(6) (and the Account Agreement) apply "without regard to the care or lack of care of the customer or the bank..." Because Carson Fischer claimed improper

charges, unauthorized signature or alteration, the Court of Appeals Opinion erroneous holding that § 4406(6) does not apply, effectively nullifies the defense provided by § 4406(6) and supplants the Code, and substitutes liability in place of the Code.

Contrary to the Opinion: (i) by Carson Fischer's own admission, its claims involved unauthorized signature, forgery, discrepancies, improper charges or alteration of checks, thus making them subject to § 4406(6) and the parties' Account Agreement; (ii) § 4406(6) and the Account Agreement bar recovery for improper payment where a customer does not report improper payment based on unauthorized signature, forgery, discrepancy, improper charge, or alteration within a certain time period (one year/30 days), regardless whether the unauthorized signature, forgery, improper charge, discrepancy, or alteration is "readily apparent" on any bank statement;[7] (iii) there is no dispute on the record that the unauthorized signatures, forgeries, improper charges, discrepancies, or alterations should reasonably have been discovered from both the bank statements and the returned checks; and (iv) Carson Fischer's § 4401 claim is necessarily subject to Michigan National's § 4406(6) failure to report defense. Furthermore, under *Siecinski, supra*, any common law duty of inquiry does not override or avoid § 4406(6)'s and the Account Agreement's notice requirement.

ARGUMENT

Standard of Review. This Court reviews *de novo* the grant or denial of summary disposition, *Dressel v Ceweribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). The Court reviews questions of statutory interpretation (questions of law) *de novo*, *State Treasurer v Abbott*, 468 Mich 143; 660 NW2d 714 (2003); and also the interpretation of contracts, *Bandit Industries v Hobbs Int'l*, 463 Mich 504; 620 NW2d 531 (2001).

[7] In this respect, the decision is not only clearly erroneous, but conflicts with another decision of the Court of Appeals, *Siecinski v First State Bank of East Detroit, supra.* *See* MCR 7.302(B)(5).

I. CARSON FISCHER'S § 4401(1) CLAIM TO RECOVER OR RECREDIT ITS ACCOUNT FOR IMPROPERLY PAID ITEMS IS BARRED BY ITS FAILURE, UNDER § 4406, AND THE ACCOUNT AGREEMENT, TO DISCOVER AND TIMELY REPORT TO THE BANK ANY ALLEGED IMPROPER PAYMENT BASED ON "UNAUTHORIZED SIGNATURES," DISCREPANCIES, IMPROPER CHARGES, AND "ALTERATIONS" OF ITEMS AFTER RECEIPT OF THE STATEMENTS AND CANCELLED CHECKS.

A. Part 4 of Article IV And The Customer Agreement

Part 4 of Article 4 of the Code, MCL 440.4401-4407, (UCC § 4401 – § 4406) governs the relationship between Carson Fischer as customer and Michigan National as payor bank. The statutory provisions prescribe in detail what items a bank may charge against its customer (§ 4401); the bank's liability for wrongful dishonor of an item (§ 4402); the customer's right to stop payment (§ 4403); payment of stale checks (§ 4404); customer death or incompetence (§ 4405); and the customer's duty to discover and report unauthorized signature or alteration (§ 4406). Notably, the sections stipulate detailed duties and responsibilities, and damages; some contain detailed allocations of burden of proof, e.g., § 4406(3).

In general, a bank may charge against its customer's account an item that is "properly payable," § 4401(1) and is liable to the customer for dishonoring an item that is properly payable (§ 4402(2)). An item is properly payable if it is authorized by the customer and in accordance with any agreement. § 4401(1) Accordingly, if the checks at issue were all properly completed, were payable to the bank for Rasor's personal loan account number, were not altered, and were all properly signed, Michigan National was entitled to so pay the checks and charge the checks against Carson Fischer's account. On the other hand, the bank may not charge against the customer items that are not properly payable, White and Summers, Uniform Commercial Code (4^{th} ed) § 21-3, pp 362-363, quoted at p 43, *infra.* The customer, however, must discover and timely report any improper payment due to unauthorized signature (including forgery) or alteration, § 4406(3) or be precluded from asserting wrongful payment. § 4406(4)(b). The statutory consequences change where a bank has paid a check, has returned it to a customer, and

a year expires with no complaint or report. Regardless of care or the lack thereof, if the customer fails to discover and report an unauthorized signature (including forgery) or alteration on an item within one year, the customer's claim is precluded. Section 4406(6).[8] In addition, where the altered or forged check has been accepted and forwarded by another bank, the payor bank cannot pursue that bank for breach of warranty under § 4208. Section 4406(6) states:

> *Without regard to care or lack of care of either the customer or the bank*, a customer who does not within 1 year after the statement or items are made available to the customer (subsection (1)) discover and report his or her unauthorized signature on or any alteration on the item is precluded from asserting against the bank the unauthorized signature or alteration. If there is a preclusion under this subsection, the payor bank may not recover for breach of warranty under section 4208 with respect to the unauthorized signature or alteration to which the preclusion applies. (emphasis added)

The above Code provisions further the objective of promoting certainty and predictability, and facilitate transactions by allocating responsibility among the parties according to whoever is best able to prevent a loss. *See Am Airlines Eee's Fed Cred Union v Martin,* 29 SW2d 86, 92; 42 UCC Rep Serv 2d 259 (Tex, 2000) for a full explanation of the sections and policies behind them. "Because the customer is more familiar with his own signature, and should know whether he authorized a particular withdrawal or check, he can prevent unauthorized activity better than a financial institution, which may process thousands of transactions in a single day. Section 4406 acknowledges that the customer is best able to detect unauthorized transactions on his own account by placing the burden on the customer to discover and report such transactions." *Id.* In *Am Airlines,* the Texas Supreme Court reversed the court of appeals holding which had narrowly limited § 4406 on the basis that an embezzler had not used "items" with "unauthorized signatures" to withdraw funds.

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[8] In addition, the parties' Account Agreement modified § 4406(6) by shortening the notification period to thirty (30) days and expanding the events that required notification to include discrepancies and improper charges as well.

This Court has ruled that:

> The Uniform Commercial Code must be "liberally construed and applied to promote its underlying purposes and policies." MCL 440.1102(1); MSA 19.1102(1). The court is to apply the language under a particular section of the code to further both that section's specific purpose and policies and the general underlying purposes of the code. UCC 1-102(1), Official Comment (1). Two of the code's general purposes are to simplify, clarify, and modernize commercial law and to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties. MCL 440.1102(2)(a), (b); MSA 19.1102(2)(a), (b). One authority has acknowledged that an additional underlying purpose of the code is to make "the law of commercial transactions be, so far as reasonable, liberal and nontechnical." 1 White & Summers, Uniform Commercial Code (3d ed), § 4, p 15.

NBD-Sandusky Bank v Ritter, 437 Mich 354, 360; 471 NW2d 340 (1991).

Here, Michigan National made available full statements and items, i.e., all cancelled checks, pursuant to § 4406(3). The § 4406(6) notice requirement is a condition to suit and bars any untimely, unreported claims, without regard to the theory of recovery. *Siecinski v First State Bank,* 209 Mich App 459; 531 NW2d 768 (1995); *Euro Motors Inc v Southwest Fin'l Bank & Trust Co,* 297 Ill App 3rd 246; 696 NE2d 711 (1998).

It was Carson Fischer's statutory responsibility to examine the items, its own statements and cancelled checks, for unauthorized signature (including forgery) or alteration or discrepancies or improper charges in order to determine if improper payment had been made as a result thereof. Section 4406(3). (*See also* the Account Agreement.) Given the clear purpose of these sections to define the bank's responsibility to its customer, and the customer's to the bank, these statutory provisions occupy the field and control any inconsistent common-law remedies, such as negligence or contract, asserting improper payment. *Arkwright Mutual Ins Co v State Street Bank & Trust Co,* 428 Mass 600; 703 NE2d 217 (Mass 1998); *Mahaffey & Assoc v Long*, 52 UCC Rep. Serv. 2d 477 (Del. Super. 2003) (unreported, attached).

This Court has held that another article (9) of the Code provides a "comprehensive scheme" regulating the subject matter covered and that official comments are useful aids to construction, *Shurlow v Bonthuis*, 456 Mich 730; 576 NW2d 159 (1998). The Code's Official Comment to § 1-103, paragraph 2, makes clear the preemptive effect and purpose of the Code:

> Subsection (b) states the basic relationship of the Uniform Commercial Code to supplemental bodies of law....Therefore, while principles of common law and equity may *supplement* provisions of the Uniform Commercial Code, they may not be used to *supplant* its provisions, or the purposes and policies those provisions reflect, unless a specific provision of the Uniform Commercial Code provides otherwise. In the absence of such provision, the Uniform Commercial Code preempts principles of common law and equity that are inconsistent with either its provisions or its purposes and policies.

Only one Carson Fischer claim was revived by the Court of Appeals--its Count III action as drawer to recredit drawer's account because checks charged against the account were "not properly payable." Complaint, ¶¶50-53 (11a). Count III necessarily arises under Part 4 of Article 4 of Michigan's Uniform Commercial Code. Article 4 authorizes an action by a customer against a bank to recredit the drawer's account where the bank has charged the account for an item not properly payable, § 4401; Article 4 also precludes the assertion of unauthorized signature (including forgery) or alteration (or other agreed matters) if the customer fails to report an unauthorized signature or alteration of an item (*i.e.*, a check) within one year (or other agreed time) of the bank's sending the checks or bank statement to the customer, § 4406(6).

To prevail on its § 4401 action to recredit drawer's account, Carson Fischer alleged that the checks its employee, Rasor, used to embezzle funds were not "properly payable" from Carson Fischer's account. Otherwise, the bank could charge the items against the account.

> A bank may charge against the account of a customer an item that is properly payable from that account even though the charge creates an overdraft. An item is properly payable if it is authorized by the customer and is in accordance with any agreement between the customer and bank.

MCL 440.4401(1). Accordingly, if the MNB checks were properly signed and completed, authorized, in accord with the agreement,and were not altered or forged, they were properly payable and properly charged against Carson Fischer's account under § 4401(1).

If, on the other hand, the items charged against Carson Fischer's account were not properly payable because of unauthorized signature (including forgery) or alteration or discrepancies or improper charges, the bank could not properly charge the items provided the customer timely reported the matters. However, Carson Fischer was precluded by § 4406(6) and by the parties' Account Agreement from asserting its § 4401 claim if, within 30 days of receiving the bank statements and canceled checks, Carson Fischer failed to notify Michigan National of any discrepancies, unauthorized payment based on unauthorized signatures (including forgeries), discrepancies, alterations or improper charges. Here, no such timely report was made. This preclusion applies "without regard to the care or lack of care" of Carson Fischer or Michigan National.

The parties' Account Agreement modified § 4406(6) by shortening the notification period and expanding the events that required notification:

> You [Carson Fischer] agree to promptly examine your statement and, if applicable to your account, all canceled checks contained with your statement, and to notify the Bank of any discrepancies, forgeries, or improper charges to your account within thirty (30) days after the Bank mails or otherwise makes your statement available to you. If you do not so notify the Bank of any discrepancies, forgeries, alterations, or improper charges to your account, your claim will be absolutely barred and waived.

Account Agreement (134a). Such modifications are permitted by MCL 440.4103(1) as long as the bank's liability or responsibility is not disclaimed.

B. Contrary To The Opinion Below, Carson Fischer Alleged, And This Case Involves, Improper Payment Based On Forgeries Or Unauthorized Signatures, Improper Charges, Discrepancies, And Alterations In Fact

Contrary to the Court of Appeals Opinion, this case involves unauthorized signatures (including forgeries) and alterations on the checks. Here, Carson Fischer's own pleadings and

admissions claimed that unauthorized signature, forgery and alterations were involved. *See* Complaint, ¶¶50-53 (11a) quoted at p 1, *supra;* and Admissions, cited below). Furthermore, the undisputed record established that improper charges in fact were revealed on the bank statements and checks. An unauthorized signature is one made without actual, implied or apparent authority. MCL 440.1101(43). Nonetheless the Court of Appeals erroneously held that § 4406(6) and the Account Agreement did not apply to Carson Fischer's § 4401 claim because the case "does not involve forgery or alteration of checks." Feb 8, 2005 Opinion at p 5 (335a). This pronouncement in the *per curiam* Opinion, as well as the Court's statement that "[a]n account signatory apparently signed the checks" (*id.* at p 2), contradicts or disregards the record, the Complaint's allegations of forgery and the admissions of unauthorized signatures by Carson Fischer:

- Carson Fischer's Complaint alleged that "*Rasor presented checks with forged signatures or endorsements to Michigan National*, and Michigan National charged these checks to the Firm's accounts, even though the checks were not properly payable." Complaint at ¶50, emphasis added. (11a).

- Joseph Fischer, whose purported signature appeared on most of the checks at issue, testified that *it "certainly is possible" that someone forged his signature* and, while they appear to be his signatures on the checks, "they may not be my signatures." Fischer at pp 94-95 (115a). Carson Fischer "never went through the analysis to determine what checks were forged. There may or may not be forged checks." Carson at p 417 (108a).

- Carson Fischer admitted that to "the extent Rasor obtained the signature of a partner of the Firm, he did so through fraud and deceit and, therefore, the signature was not authorized." Carson Fischer Admissions, ¶ 31 (74a).

- Carson Fischer admitted that inasmuch as "Rasor obtained signatures from members of the Firm under false pretenses, the signatures were unauthorized and arguably 'forged'." Carson Fischer Admissions, ¶ 32 (75a).

A cursory review of the checks reveals different purported signatures of Joseph Fischer, supporting the admission that the signatures arguably were forged. (p 14, *supra.*) (199a-201a). Carson Fischer never testified or submitted an affidavit affirmatively stating that the signatures on the checks were genuine.

In addition, as to whether the checks were altered by insertion of Rasor's account number, there are two possibilities. Assuming that Rasor did not forge the signatures of Carson and Fischer, either the checks had Rasor's personal loan account number on when signed, or the number was added later after the checks were signed by Carson and Fischer.

- As the Court of Appeals itself acknowledged, "Rasor inserted his personal loan number on the face of the check." Feb 8, 2005 Opinion at p 2 (332a). *See, also*, exemplar checks that reflect Rasor's loan number on the front of the checks, p 14, *supra*. (199a-201a).

In response to Request for Admission No. 35 Carson Fischer declined to admit that the checks were not altered; it essentially claimed that it would now be impossible for Carson Fischer to determine whether the Michigan National checks were altered. (76a).

Carson testified he does not know if the loan account numbers were on the checks he signed (assuming he signed them) before or after he signed them. Carson Dep at p 441-442 (109a). Joseph Fischer testified that the Rasor account numbers might have been on the checks when he signed the checks (assuming he signed them) and they might not have been on the checks-he does not know. Fischer Dep at p 95 (115a). Clearly, however, Carson Fischer alleged that checks or other documents were submitted that "appeared to transfer the Firm's funds to the care of Michigan National, but in reality transferred the Firm's funds to Rasor's own accounts..." Complaint, ¶ 35 (9a).

Carson Fischer thus predicated its recredit claim on forgery or unauthorized signature and unauthorized changes or alterations of the checks.

C. The Circuit Court Correctly Held That Carson Fischer Could Not Contradict Its Pleadings And Admissions In Order To Avoid Summary Disposition

The Circuit Court carefully reviewed the record below and determined that claims of unauthorized signature (forgery) and alteration were involved. It ruled as follows:

> Here, there is no dispute that Plaintiff alleged in its complaint that "Rasor presented checks with forged signatures or endorsements to Michigan National, and Michigan National charged those checks to the Firm's accounts, even though the checks were not properly

> payable." (Plaintiff's Complaint, p9, paragraph 50). Plaintiff also alleged that "Michigan National is obligated to recredit the Firm's accounts for the unauthorized payment of the checks in the amount of their unauthorized payments, believed to exceed $5 million." (Plaintiff's Complaint, p 9, paragraph 53).
>
> Furthermore, in response to the Bank's Requests for Admissions, Plaintiff admitted that the check signatures were not "authorized" and that they were "arguably 'forged.'" (Defendant's Exhibit "3", Plaintiff's Answers and Objections to Defendants' First Requests for Admissions and Second Set of Interrogatories and Document Requests to Plaintiff Carson Fischer PLC, Paragraphs 30, 31, 32).
>
> Given the foregoing, Plaintiff may not now claim that the foregoing checks were properly payable or otherwise not altered or forged for purposes of avoiding summary disposition. See *Atkinson v Detroit*, 222 Mich App 7, 12 (1997).

(308a). Contrary to Carson Fischer's Brief Opposing Application for Leave, Michigan National does not "want" this to be a case of "forgery" because "forgery" is a defense. Rather, this is a case which was pled as forgery or alteration and then contradicted, by plaintiff, to avoid summary disposition. The Circuit Court's ruling correctly applied the principles of *Atkinson v Detroit*, 222 Mich App 7, 12; 564 NW2d 473 (1997), and other cases like it, such as *Kaufmann & Payton, P.C. v Nikkila*, 200 Mich App 250, 256-257; 503 NW2d 728 (1993) (to avoid summary, party may not take contradictory positions on facts). *See also Kerns v Dura Mech'l Components, Inc.*, 242 Mich App 1; 618 NW2d 56 (2000).

D. Under The Code, Carson Fischer's Claim Asserted Checks Paid (Improper Charges) In Spite Of "Unauthorized Signatures" (§ 1201(43))

Properly analyzed, the Complaint necessarily presents issues of "unauthorized signature" and "alteration" as a matter of law. Under the Code, "'Unauthorized' signature means one made without actual, implied or apparent authority and includes a forgery." MCL 440.1201(43). With respect to checks, the "unauthorized signature" claim can thus be one of two types: either (i) a signature that is not the signature of the purported signer (i.e., forged, because "unauthorized signature" includes a forgery); or (ii) a signature made without actual, implied or apparent

authority. Section 1201(43). Comment 2 to MCL 440.3406 adds that an "unauthorized" signature "includes not only forgery but also the signature of an agent which does not bind the principal under the law of agency." Carson Fischer pled both types of unauthorized signatures.[9] If the signatures on the Carson Fischer checks were not the signatures of the purported signers, then they were unauthorized signatures under definition (1) and in essence forgeries. On the other hand, if a signature on any given check was that of the signer, but obtained by trickery, and hence is claimed not binding on the Firm, as principal, to pay the check to Rasor's numbered account, then the signature was also "unauthorized" under definition (2). In either event, Carson Fischer had a responsibility to discover and report both, *i.e.*, to report any payments based on any forgeries or unauthorized signatures, and any improper charges.

E. Under The Code, Rasor's Insertions of His Account Numbers On the Face of The Checks Constituted Unauthorized "Alterations" (§ 3407) Transferring The Checks To Rasor's Own Account, As Carson Fischer Alleged

"Alteration" is also defined by the Code. As defined in the 1993 amendments, under § 3407(1), "alteration" means

> (i) an unauthorized change in an instrument that purports to modify in any respect the obligation of a party; or
>
> (ii) an unauthorized addition of words or numbers or other change to an incomplete instrument relating to the obligation of a party."

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[9] "Rasor presented checks with forged signatures or endorsements to Michigan National, and Michigan National charged those checks to the Firm's accounts, even though the checks were not properly payable." Complaint at ¶ 50 (11a).

"Because Rasor obtained signatures from members of the Firm under false pretenses, the signatures were unauthorized and arguably 'forged.' However, without submitting each check to a document examiner, the Firm cannot determine the extent to which signatures were falsified." Plaintiff's Answers and Objections to Defendants' First Requests for Admissions and Second Set of Interrogatories and Document Requests to Plaintiff, Carson Fischer PLLC at No. 32 (197a-198a).

"To the extent Rasor obtained the signature of a partner of the Firm, he did so through fraud and deceit and, therefore, the signature was not authorized." Response to Interrogatory No. 31 (197a).

The key to finding an "alteration," is whether the change or addition was authorized and affected the parties' obligations. *See* 6 Anderson, Uniform Commercial Code (3d ed), § 3407.61, p 605 (citing cases).[10] By the unauthorized insertion of his account number on the face of the checks, *see* § 3407(1), Rasor purported to modify the obligation of the parties to the checks so that, instead of being payable to Michigan National Bank, the checks became payable to himself. Carson Fischer so alleged, that Rasor submitted "checks or other documents...which in reality transferred the Firm's funds to Rasor's own accounts..." Complaint, ¶ 35 (9a).

The insertion of Rasor's account number effectively changed the payee. MCL 440.3110 determines the "person to whom instrument payable." MCL 440.3110(3) states that:

> "A person to whom an instrument is payable may be identified in any way, including by ...account number."

The following rules apply under § 3110(3):

> "(a) If an instrument is payable to an account and the account is identified only by number, the instrument is payable to the person to whom the account is payable."

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[10] Subsection (2) of § 3407 provides that, in certain circumstances, "an alteration *fraudulently made* discharges" the party's obligation. MCL 440.3407(2) (emphasis added). Some authors have incorporated the fraud component into the definition of "alteration." *See* 6 Anderson, *supra*, § 3-407:46, p 599 ("In order to constitute an 'alteration' within ... § 3-407, the change ... must be made with a fraudulent intent.") (citing *Northwestern Nat Ins Co of Milwaukee, Wisconsin v Lutz*, 71 F3d 671 (CA 7, 1995)).

The pre-1993 definition of "alteration" in § 3407(1) similarly emphasized "the changes [in] the contract of any party... in any respect." *See* MCL 440.3407 (1970). Specifically, the section formerly provided as follows:

> Any alteration of an instrument is material which changes the contract of any party thereto in any respect, including any such change in
>
> (a) the number or relations of the parties; or
> (b) an incomplete instrument, by completing it otherwise than as authorized; or
> (c) the writing as signed, by adding to it or by removing any part of it.

MCL 440.3407 (1970).

Under § 3110(3)(a), and the Uniform Commercial Code Comment to it, the result where a check, drawn on the payor bank, is payable to an account number is clear:

> "For example, Debtor pays Creditor by issuing a check drawn on Payor Bank. The check is payable to an account number owned by Creditor, but identified only by number. Under the first sentence of § 3110(c)(1), the check is payable to Creditor..."

Thus if Rasor changed the checks by adding his account number after the checks were signed, he added to the writing, added a party and changed the obligations of the parties. "Rasor inserted his personal loan number ... and used the check to pay his personal loans without endorsing the check." *See* Court of Appeals Opinion (332a). Under the Code, Rasor's insertion of his account number on the checks necessarily constitutes an "alteration" of the checks, because it changed the payee from Michigan National to the owner of the designated account number and thereby purportedly modified obligations of the parties. § 3407(1). The conclusion that an "alteration" was effected by insertion of a personal account number is confirmed by § 3115(3), which provides that if words or numbers are added to an incomplete instrument without authority of the signer, there is an alteration of the incomplete instrument under section § 3407.

Courts have long held that the change of a payee[11] is a material alteration; and, here, Rasor, in effect, changed the payee from Michigan National to his MNB account (*i.e.*, himself). Complaint ¶ 35 (9a). The following cases find that alteration of the payee is a material alteration. *Silvia v Industrial Nat'l Bank of Rhode Island*, 121 RI 810; 403 A2d 1075 (1979), similarly involved embezzlement of funds by altering the name of the payee on the face of a check. Specifically, in that case, the plaintiff's accountant added his name to the "payable to"

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[11] A "payee" is "[o]ne to whom money is paid or payable; esp., a party named in commercial paper as the recipient of the payment." Blacks Law Dictionary (8th ed. 2004). In this case, MNB was the original payee; Rasor was the payee after the alteration. A "drawer," on the other hand, is "[o]ne who directs a person or entity, usually a bank, to pay a sum of money stated in an instrument ... ." Blacks Law Dictionary (8th ed. 2004). Carson Fischer is the drawer here.

line; the check was originally written as payable to "Internal Revenue Services," but after his addition, read "Internal Revenue Services by John J. Mahoney." *Id.* at 811-12. The accountant then endorsed the check and the defendant bank provided him with cashier's checks in his name. *Id.* at 812. Following discovery of this change (but after one year had passed), plaintiff brought suit against the defendant bank. *Id.* at 812-13. Determining that § 4406's one-year limitation barred the plaintiff's suit,[12] the Rhode Island Supreme Court held that "the check before us was materially altered when Mahoney added the words 'by John J. Mahoney' to the payee space." *Id.* at 814. *See also Biltmore Associates Ltd v Marine Midland Bank*, 578 NYS2d 798, 799; 178 AD2d 930 (NY App Div, 1991) (holding that "the check was materially altered by changing the name of the payee (§ 3407(1))'); *Garnac Grain Co v Boatmen's Bank & Trust Co of Kansas City*, 694 F Supp 1389, 1395 (WD Mo, 1988) (holding "as a matter of law" that "an alteration which adds an alternative payee to a check is a material alteration as that term is used in the UCC") (citing older version of UCC § 3407 noted above); 6 Anderson, *supra*, § 3407:62, p 605 ("The change of the name of the payee of a check is a material alteration.") (citations omitted).

Under § 3110(3), adding Rasor's account number made the checks payable to "the person to whom the account is payable", or i.e., to Rasor. This insertion purported to modify the contract of the parties "in any respect," § 3407(1), by changing the instruction to the Bank from one to pay to the order of the Bank to an instruction to pay to the order of Rasor -- the bank was directed to pay a different party. Thus, as in *Silvia* and the cases noted above, the change was an "alteration" as that term is used in § 4406(6), and Carson Fischer's failure to report the alteration bars its claims.

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[12] It is important to note that the *Silvia* court was interpreting the earlier versions of that state's 4-406 and 3-407-*i.e.*, statutes that were equivalent to MCL 440.4406 and MCL 440.3407 as they were written before the 1993 amendments. As noted above, however, these statutes are fundamentally similar to the previous versions.

The time as of which the Rasor loan account number was inserted, whether before or after the signing, does not change the outcome. If the insertion of the Rasor account number was accomplished before the signing, the insertion of Rasor's loan account number on the face of the check, either rendered the signature "unauthorized" (even if genuine), or constituted an alteration, because the insertion was unauthorized, effected a change by restricting the payee to Rasor's personal account, was fraudulent and purported to modify "in some respect" the obligations of both Carson Fischer and Michigan National, in that only Rasor's account could be paid. Section 3407(1)(i). Alternatively, the insertion of the Rasor personal account number, if inserted later, accomplished the same thing. Section 3407(1)(ii). *See also* § 3115(3). Materiality is clear, as is intent to defraud. Under § 3407, Rasor made an unauthorized "addition" of account numbers with the effect of changing the payee. Thus, this case clearly involves unreported alterations.[13]

The Court of Appeals' pronouncement that the case does not involve forgery or alteration of checks thus errs in law: it disregards or misinterprets the Code's definitions of "unauthorized" signature, MCL 440.1201(43) (defining "unauthorized signature" as "one made without actual, implied or apparent authority and includes a forgery."). It also disregards or misinterprets the definition of "alteration" (§ 3407). The Court of Appeals also erred in fact in concluding that this case did not "involve forgery or alteration of checks." The February 8, 2005 Opinion should be reversed on the issue of whether this case involved unreported unauthorized signature, forgery or alteration of checks and § 4406(6) and Account Agreement preclusion should be found to apply.

[13] The only other conclusion is that nothing is wrong with the checks and they are properly payable. See Argument III, pages 44-47, *infra*.

II. CONTRARY TO THE COURT OF APPEALS DECISION, § 4406(6) AND THE ACCOUNT AGREEMENT PRECLUSION – RESULTING FROM THE CUSTOMER'S FAILURE TO DISCOVER AND REPORT ANY IMPROPER PAYMENT BASED ON UNAUTHORIZED SIGNATURE, DISCREPANCY, IMPROPER CHARGE, OR ALTERATION – APPLIES WITHOUT REGARD TO CARE OR LACK OF CARE, AND IS NOT LIMITED TO FAILURES TO DISCOVER AND REPORT ONLY SUCH MATTERS AS ARE "READILY APPARENT" FROM A BANK STATEMENT

As before noted, § 4406(6) provides a statutory preclusion defense to a customer claim of improper payment, and applies "without regard to care or lack of care of either the customer or the bank.... § 4406(6). That statutory language alone rejects any concept that circumstances tending to show customer care or excusing the lack of customer care enter into § 4406(6) preclusion analysis. Indeed, the careful inclusion of language eliminating fault concepts from § 4406(6), that is, the provision that it apply "without regard to care or lack of care of either the customer or the bank," distinguish this subsection (6) from others, such as § 4406(3) and § 4406(5). Under § 4406(6) (and here the Account Agreement), the customer has only one year (or 30 days) to discover and report improper payment based on unauthorized signatures (including forgeries) or alterations (or discrepancies or improper charges); if he has not done so, he is precluded from asserting them against the bank. Among other reasons, the consequences to the bank must also be considered; if the bank's customer has not discovered and reported an unauthorized signature or alteration within a year, the bank is likewise precluded from pursuing a collecting bank for § 4208 breach of warranty based on unauthorized signature or alteration. Section 4406(6). In essence, after statements or checks have been made available to the customer for one year and no report is made by a customer of unauthorized signature or alteration, his checks are left as they were paid.

A. Section § 4606(6) (And Account Agreement) Preclusion Applies To All Unreported Alterations, Improper Charges, Discrepancies, And Unauthorized Signatures Not Reported Within A Year (Or Within 30 Days) Without Regard To Customer Or Bank Care Or Lack Of Care

The Court of Appeals' erroneous holding that § 4406(6) does not preclude Carson Fischer's claim was based, in large part, on the Court's too narrow reading of the statute. The *per curiam* Opinion reflects this error in stating that §4406 "creates a duty on the part of the customer in situations involving forgery or alteration, both of which should be *readily apparent* to the customer upon comparison of the bank statement with the customer's own records." (335a). Such limitation of a customer's duty of discovery to "readily apparent" items does not appear in § 4606(6). While it is true that other subsections, such as § 4406(3), turn on whether the customer "should reasonably have discovered" the unauthorized payment, signature or alteration, nothing in § 4406(6) does. The Account Agreement duty also does not turn on such a limitation. Moreover, § 4406(6) does not impose a duty; rather, it plainly prescribes the preclusion consequences of not reporting unauthorized signatures or alterations for more than a year no matter how much care or lack of care is involved. Further, § 4406(6) limits the payor bank's recovery rights as well as the customer's.

To understand why the Court of Appeals' conclusion is flawed, it is helpful to examine the other subsections of § 4406. Generally, subsections (1) and (2) provide duties of the bank; subsection (3) establishes the duty of the customer to promptly examine statements and items; subsection (4) provides the bank with a preclusion defense when the customer breaches his duty under subsection (3); and, subsection (5) provides the customer a means of mitigating his loss under certain limited circumstances even if he fails to discover unauthorized payment or to "promptly" notify his bank under subsection (3). Subsection (6), on the other hand, provides an independent and absolute time limit and preclusion consequence "without regard to care or the

lack thereof by either the customer or the bank." So also does the Account Agreement, which requires report of an improper charge within 30 days.

More specifically, subsection (1) of § 4406 requires a bank to "return or make available" information related to the account. MCL 440.4406(1). That information may be the specific "items paid" or an account statement with "information ... sufficient to allow the customer reasonably to identify the items paid." *Id.* There is a safe-harbor for banks: The account statement is sufficient if "the item is described by item number, amount, and date of payment." *Id.* However, even if the "items paid" are not returned to the customer, the bank is required to retain them for seven years and must provide them upon request of the customer. MCL 440.4406(2).

Subsection (3) requires a customer to "exercise reasonable promptness" in examining the materials made available by the bank (pursuant to subsection (1)) and in reporting any "alteration" or "signature by or on behalf of the customer [that] was not authorized." MCL 440.4406(3). This subsection explicitly states as follows: "If, based on the statement or items provided, the customer should reasonably have discovered the unauthorized payment, the customer must promptly notify the bank of the relevant facts." *Id.*

Subsection (4) precludes a customer who breaches his subsection (3) duties from asserting the unauthorized signature or alteration against the bank in the following circumstances: (a) where the bank suffers a loss; or (b) in case of an unauthorized signature or alteration "by the same wrongdoer" on any item where payment was made in good faith before receiving notice from the customer and after the customer was given a reasonable period, not exceeding 30 days, to examine the item or account statement.

Subsection (5) limits the effect of subsection (4) in certain circumstances. That is, if the bank did not "exercise ordinary care", then subsection (4) applies only so that the loss is

allocated between the customer and the bank; if the bank "did not pay the item in good faith" then subsection (4) does not apply.

Section § 4406(6) then provides as follows:

> (6) Without regard to care or lack of care of either the customer or the bank, a customer who does not within 1 year after the statement or items are made available to the customer (subsection (1)) discover and report his or her unauthorized signature on or any alteration on the item is precluded from asserting against the bank the unauthorized signature or alteration. If there is a preclusion under this subsection, the payor bank may not recover for breach of warranty under section 4208 with respect to the unauthorized signature or alteration to which the preclusion applies.

Importantly, unlike any other subsection, § 4406(6) thus expressly applies "[w]ithout regard to care or lack of care of either the customer or the bank … ." In other words, no matter whether "the customer should reasonably have discovered the unauthorized payment" or whether the bank "exercise[d] ordinary care," a customer who does not discover and report an unauthorized signature or alteration within one year is precluded from asserting it against the bank. This is "*not* a limitation statute *subject to tolling under compelling circumstances* but is a statutory prerequisite of notice that absolutely bars a customer's right to make a claim against the bank after one year … ." *Siecinski v First State Bank of East Detroit*, 209 Mich App 459, 464; 531 NW2d 768 (1995) (emphasis added). Thus, it was error for the Court of Appeals to import the "reasonable discovery" requirement from subsection 3, *see* Opinion (335a) (holding that "forgery and alteration … should be readily apparent"), and seemingly graft it onto the absolute notice provision of subsection (6), as well as onto the Account Agreement.

Further, § 4406(6) is a time-actuated preclusion defense; nothing in § 4406(6) limits the bank's defense to unreported but "readily apparent" unauthorized payments based on unauthorized signatures (including forgeries), alterations, discrepancies or improper charges. Nor does the Account Agreement, representing the parties' authorized and agreed-upon modification of § 4406(6), narrow the duty to report only "readily apparent" unauthorized

signatures (including forgeries), alterations, discrepancies or improper charges. Thus, its predecessor was held to bar a claim that a check lacked one of two authorized signatures, unreported for a year. *King of All Mf'g, Inc. v Genesee Merchants Bank*, 69 Mich App 490; 245 NW2d 104 (1976).

By its plain language, § 4406(6) applies regardless of whether the bank statements made the discrepancies, improper charges, unauthorized signatures or alterations readily apparent. It has been applied *even where at the time the customer had no actual opportunity to review the bank statements or the checks. Siecinski v First State Bank of East Detroit*, *supra*, 209 Mich App at 464. In *Siecinski*, a wrongdoer presented a forged power of attorney and made unauthorized withdrawals from an elderly customer's account. *Id.* at 460-461. No forged or altered checks were involved. Instead, it was the forged power of attorney that allowed the wrongdoer to sign her own name, which was not forged, to make unauthorized withdrawals. *Id.* A subsequently-appointed personal representative discovered the unauthorized withdrawals and, like Carson Fischer here, sued the bank for making improper payments under MCL 440.4401. *Id.* at 461. The trial court granted the bank summary disposition under § 4406(6) because the plaintiff had not brought the action within one year of having bank statements available. *Id.*

The plaintiff appealed. The court of appeals affirmed. The court specifically noted that "[t]he language of [MCL 440.4406(6)] does not restrict its application to any particular cause of action." *Id.* at 464. Thus, it held "that the unauthorized signature may not, after one year, be asserted against the bank *in any type of action*, including a negligence action." *Id.* at 465 (emphasis added).

The Court of Appeals apparently reached its narrow application of § 4406(6) by confusing that subsection's independent significance as a time bar, and grafting onto it an element of MCL 440.4406(3). Section 4406(6) provides an absolute defense if unauthorized

signatures (including forgeries) or alterations or discrepancies or improper charges (as provided by the parties' Account Agreement) go unreported for more than a year (or 30 days), *"without regard to care or lack of care of either the customer or bank."* Section 4406(3), on the other hand, imposes a duty on a bank customer like Carson Fischer to report unauthorized payments which it "should reasonably have discovered" based on review of bank statements and items actually provided the customer. It states:

> (3) If a bank sends or makes available a statement of account or items pursuant to subsection (1), the customer must exercise reasonable promptness in examining the statement or the items to determine whether any payment was not authorized because of an alteration of an item or because a purported signature by or on behalf of the customer was not authorized. *If, based on the statement or items provided, the customer should reasonably have discovered the unauthorized payment, the customer must promptly notify the bank of the relevant facts.*

MCL 440.4406(3) (emphasis added).

The last sentence of § 4406(3) was added in 1993. The consequences of customer failure to promptly report are set forth in subsections (4) and (5). The legislature made no such "reasonably discovered" exception to the time-bar preclusion provisions of § 4406(6), however, and cannot be presumed to have intended such a change. *See Michigan Dep't of Transp v Thrasher*, 446 Mich 61, 78; 521 NW2d 214 (1994). Section 4406(6), both by its plain language and its interpretation in *Siecinski,* bars recovery for improper payment where a customer does not report an unauthorized signature, forgery or alteration within a year, without regard to its care or the lack thereof, and without regard to whether the forgery or alteration is "readily apparent." The Account Agreement added items to be reported and shortened the time. The Court of Appeals' erroneous interpretation of § 4406(6) and the Account Agreement cannot be justified by statutory or contract language. It must be reversed.

B. Section 4406(6) And Account Agreement Preclusion Applies To All Theories Of Claim

Courts have also addressed the effect of § 4406(6)'s limitations on common law claims, and found that it applies to all claims. As noted above, the court in *Siecinski* found that all claims are barred. Other courts agree with this analysis. For instance, in *Wetherill v Putnam Investments*, 122 F.3d 554, 558 (CA 8, 1997), the plaintiffs argued that their common-law causes of action were not barred by the one-year limit in § 4406(6). The Eighth Circuit Federal Court of Appeals disagreed and held as follows:

> First of all, § 4406(4) [now 4406(6)] itself states quite generally that the bank customer "is precluded from asserting against the bank [an] unauthorized signature" if the customer does not comply with its notice requirements. The very generality of the language suggests that it bars the bank's liability in the relevant circumstances, regardless of the theory on which the customer is relying. There is nothing in § 4406(4) that supports the view that only claims under the UCC are barred. It is no doubt the sweeping language of the relevant section that led one commentator to conclude, we think correctly, that the "time limits imposed by UCC § 4406 are applicable without regard to the theory on which the customer brings his or her action." See [Anderson, *supra*, § 4406:24,466].
>
> More importantly, the Supreme Judicial Court of Massachusetts, ... has specifically held that § 4406(4) bars claims sounding in contract or negligence, see [*Jensen v Essexbank*, 396 Mass 65; 483 NE2d 821 (1985)]. The claims of negligence, conversion, breach of fiduciary duty, and failure to adhere to commercially reasonable standards are all based on the defendants' alleged failure to act in a reasonable manner, and we do not hesitate to conclude that the rule of *Jensen* extends to all of them.

Id.; see also Concrete Materials Corp v Bank of Danville & Trust Co, 938 SW2d 254, 259 (Ky 1997) (holding that the one-year time limit barred a plaintiff customer's right to sue the bank "regardless of the theory on which the plaintiff brings suit") (citation omitted); *Brighton, Inc v Colonial First Nat'l Bank*, 176 NJ Super 101, 110; 422 A2d 433 (1980) (rejecting plaintiffs' argument "that they can avoid the time limitation [from former § 4406(4)] by couching their claims based on forged signatures in different terms, viz. negligence, conversion, ... and breach

of contract"); *New Gold Equities Corp v Chemical Bank*, 674 NYS2d 41, 41-42; 251 AD2d 91 (NY App Div, 1998) (holding that 4406's one-year limitation provides a defense for "plaintiff's common-law causes of action for negligence and breach of warranty ... ."); *Watseka First Nat'l Bank v Horney*, 292 Ill App 3d 933, 937; 686 NE2d 1175, 1178 (Ill, 1997) (holding that, "[d]espite [the plaintiff's] attempt to find shelter in the ten-year limitations statute by claiming breach of contract, § 4406, because of its specificity, takes precedence over the general limitations statute") (citation omitted).

C. On This Record, Any Claimed Improper Payment Based On Unauthorized Signatures (Including Forgeries), Discrepancies, Improper Charges And Alterations Should Reasonably Have Been Discovered From Both The Bank Statements And The Returned Checks

Even if concepts of reasonable discovery are considered, the Court of Appeals opinion regarding application of § 4406(6) erred in two other ways: (1) first, it either excluded information on the checks themselves from the material that may make an unauthorized signature (including forgery), discrepancy, improper charge, or alteration "readily apparent," or failed to consider that information; and (2) it decided that the bank statements in this case did not reveal the scheme or unauthorized signature (including forgery), discrepancy, improper charge, or alteration.

It is well established that a bank depositor is chargeable with knowledge of all facts that a reasonable and prudent examination of the bank statement and items provided would show, including depletion of its accounts. *Dow City Cemetery Ass'n v Defiance State Bank,* 596 NW2d 77 at 78-79; 38 UCC Rep Serv 2d 1267 (Iowa 1999):

> [T]he cemetery had a duty to examine its account statements and notify the bank of any transactions that had been made without the required authorized signatures. ... As the trial court found, if the cemetery had examined its statements, it surely would have noticed that the $60,000 sum it had deposited in the Mathys account and the funds in the other savings account were being depleted.

Id. at 81-82 (citations omitted).

As viewed by the Court of Appeals, the § 4406(6) duty to examine and notify was limited to reporting "situations involving forgery and alteration, both of which should be "readily apparent to the customer upon comparison of the *bank statement* with the customer's own records." Opinion at 5 (335a). In fact, however, both § 4406(6) and the Account Agreement obligated Carson Fischer to review not only bank statements, but also the items made available, including the canceled checks, which revealed on their face the payee via the account number where the proceeds of the checks were applied. See § 3101(3). Section 4406(6) does not ignore the returned checks; indeed, it expressly refers to the situation where nothing is reported within one year after "the statement or *items* are made available," § 4406(6) (emphasis added). Similarly, in the Account Agreement, Carson Fischer agreed "to promptly examine ... your statement and ... all *cancelled checks* contained with your statement..." Account Agreement (134a). By limiting its analysis to information on the bank statements while ignoring information on the checks, the Court of Appeals failed to give legal effect to a fact the Opinion itself recognized, *i.e.*, that the checks contained information revealing improper payments. While the Court correctly observed, "Rasor inserted his personal loan number on the face of the check",[14] it committed error in failing to view such information as triggering the duty to report. Instead, the Court of Appeals held that "[n]othing in the information contained in the *bank statement* would reveal the account to which the proceeds of the check were applied." (335a); this erroneously limited its analysis to bank statements, when both the statute and the Account Agreement required review of the checks and items made available. Moreover, there was information contained in the bank statements that would reveal misuse of the account, such as

[14] While it was not known whether Rasor inserted his loan number on the checks before or after the checks were signed (332a, note 1), it is undisputed that the loan numbers were on the canceled checks returned to Carson Fischer.

the deposits into the account by tele-transfer and the volume of money flowing through and out of the account.

Further, even if Carson Fischer's duty were limited to reviewing the bank statements only, the Court of Appeals' conclusion that "comparison of the bank statements with its [Carson Fischer's] own records" would not reveal the improper payments is error. The Opinion considers only withdrawals and utterly ignores the transfers into the accounts and, as to the checks written, the missing corresponding expected deposits. " 'Account' means any depositor credit account with a bank ..." MCL 440.4104(1)(a). The Court of Appeals conclusion ignores the fact that if checks are written for large sums intended to be deposited into a customer's second account, they will promptly show up as corresponding deposits on the statements for the second account to which the checks were intended to be written. Here, the statements clearly and plainly showed large wire transfers (or tele-transfers) into the account, which should not have occurred. Carson Dep at 88 (89a). These transfers were simply ignored.

Carson Fischer's fraud investigator (Cendrowski) readily found unauthorized payments. The day Carson Fischer was told by Michigan National about irregularities regarding Rasor, Carson called Cendrowski to investigate the Firm's accounts and finances. Cendrowski Dep at 87-89 (262a). He testified as follows. The bank statement for GA2 for 1/1/96-1/31/96 (205a) is easy to review. It is not confusing. "There's less than ten transactions." (267a). It shows there was more than $1,000 in the account. It shows wire transfers (tele-transfers) in excess of $52,000 received in the account. *Id.* It shows three checks in excess of $17,000 written out. Cendrowski Dep at 177-179 (266a-267a). In reviewing the GA2 bank statement for 1/1/96-1/31/96, "someone might inquire what the checks were for" given the purpose of GA2. (267a). It would be a point of inquiry or a red flag and someone should take a look." Cendrowski Dep at 181-182 (267a-268a).

Second, as noted, the statements clearly showed large transfers out (three checks totalling $52,000). During his review of CF's records on October 26, 2000, Cendrowski noted these checks payable to Michigan National out of GA2 and asked Carson if Carson Fischer were indebted to Michigan National. Cendrowski Dep at 130-131 (263a); at 140 (264a). Carson told Cendrowski that the Firm was not indebted to Michigan National. Cendrowski Dep at 130-131 (263a); at 140-141 (264a). Cendrowski was aware from his review of the historic general ledger of Carson Fischer that there had been debt with Michigan National at one time, but Carson told him there was no current debt. Cendrowski Dep at 141 (264a).

On October 26, 2000, Carson could not give Cendrowski an explanation that would lead Cendrowski to conclude that the checks payable from GA2 to Michigan National were for a legitimate debt of Carson Fischer to Michigan National. Cendrowski Dep at 154 (265a).

Cendrowski asked about a possible indebtedness to Michigan National because Cendrowski was seeing several checks payable to Michigan National in $17,000 amounts and Cendrowski was trying to determine why the checks were written to Michigan National. Cendrowski at 140-141 (264a). Cendrowski was trying to understand, if that were true (Carson Fischer was not indebted to Michigan National), why there would be any valid basis for large dollar volume checks from GA2 to Michigan National. Cendrowski at 141 (264a).

Ignoring such information contravenes § 4406(6). *See Concrete Material Corp v Bank of Danville & Trust Co,* 938 SW2d 254 (Ky, 1997):

> [t]he fundamental purpose of []4-4406(4) is to place the burden of prompt and reasonable inspection of bank statements on the bank customer so that upon a discovery of an alteration or irregularity, the customer and the bank could be on the alert for future problems.

Id. At 257; *see also First Nat'l Bank of Arizona,* 553 F Supp 448 at 452 (D, Mass, 1982) ("[Section] 4-406 imposes a general duty to act in a reasonable manner to reconcile bank statements and detect problems."). In that case, because the plaintiff never compared the altered

deposit slips with the originals (made available by the bank) or noted the unauthorized withdrawals by the manager on the bank statements until after one year had passed, the court barred the action pursuant to 4-406. *Id.*

All account statements were provided monthly. The Court of Appeals statement simply pronounces, without analysis, that it is impossible to discover the scheme (i.e., the appearance and disappearance of large sums of money, all transferred out by check) from the bank statements. The Opinion further assumes that the disappearance of such sums from one account and non-appearance of such sums in the intended deposit accounts cannot be discovered by review of customer records. Thus the Opinion pronounces that Carson Fischer could not have readily discovered "the type of scam involved here" (335a) and that "Carson Fischer's comparison of bank statements with its own records would not enable Carson Fischer to readily discover the fraud" (335a). These pronouncements are not supported by the record. To the contrary, it is clear, paying even the slightest attention to the customer's accounts statements and cancelled checks would have revealed the unauthorized payments, improper charges, discrepancies and forgeries or unauthorized signatures. An individual who maintains one checking account for anticipated taxes and a second account for monthly expenses would know almost immediately if a check drawn on the monthly expense account, payable to his bank and intended for the tax account, was not actually deposited, if it is assumed both statements were examined.

Quite apart from the large tele-transfers into the account, the large checks written out, and the non-appearance of corresponding deposits in any Carson Fischer accounts, there were other "readily apparent" factors here. The undisputed evidence showed that the very nature and designation of Carson Fischer's GA2 Account made the improper charges "readily apparent" from the GA2 bank statements. The GA2 was used to pay small, client-related costs when

Messrs. Carson or Fischer were unavailable to sign checks drawn on its GA1. Carson Dep at pp 88-89 (89a). GA2 was to be used for checks of less than $1,000 and was to have minimal activity. Wanger Dep at pp 29-30 (229a-230a). According to Carson Fischer's own accounting expert, the GA2 bank statements were easy to review and not confusing. Cendrowski Dep at pp 177-179 (266a-267a). The Court of Appeals, moreover, disregarded Carson Fischer's own expert's admissions that Carson Fischer's GA2 bank statements contained "red flags" that should have alerted Carson Fischer to unauthorized payments, improper charges and discrepancies. According to the expert and GA2 bank statements, month-after-month, the GA2 bank statements reflected deposits of more than $52,000 and checks written out in amounts of more than $17,000, both of which grossly exceeded the stated parameters of GA2, *i.e.*, small client cost checks of less than $1,000, minimal activity, and a small balance. Cendrowski Dep at pp 177-179 (266a-267a). Carson Fischer simply turned a blind eye to the account activity.[15] Carson did not "keep a close eye on general account number 2 to see the activities that was going in there both through check and through other matters" (Carson Dep at 89 (89a), "because theoretically there was no activity going on in that account." *Id.*

Thus, even assuming that information a customer "should reasonably have discovered" should be taken into account (which § 4406(6) does not); and even assuming that § 4406(6) and

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[15] Carson would expect to see checks in GA2 being signed by other than himself and Joseph Fischer because GA2 was established so that if the principals of Carson Fischer were gone the other signatories could sign checks from GA2. Carson Dep at p. 91-92 (90a). If Carson did not review the Michigan National bank statements and cancelled checks, nobody did in his place. Carson Dep at 277-278 (100a-101a).

Carson wanted less transaction activity in GA2 so that it would be easier to track. Carson Dep at 92-93 (90a).

Carson stated he did not follow a formal procedure concerning his review of GA2. "I did not see it on a regular basis or pay that much attention." Carson at 98-99 (91a).

When he reviewed cancelled checks and bank statements from MNB Carson did not look at the statement to see whether tele-transfers were there. Carson at p. 400 (106a).

the Account Agreement apply only where the bank statements revealed the improper charges, here the bank statements disclosed such improper charges. Again, even a cursory review of the statements and checks would have revealed the problem. Indeed, Carson Fischer never claimed or presented an affidavit that its bank statements and canceled checks *did not* reveal the improper payments. For these reasons, the Court of Appeals pronouncement that the statements did not reveal the scheme of improper charges and holding that § 4406(6) and the Account Agreement did not apply requires reversal.

III. IF THE CHECKS PRESENTED FOR PAYMENT DID NOT CONTAIN UNAUTHORIZED SIGNATURES, DISCREPANCIES, IMPROPER PAYMENTS, OR ALTERATIONS, THEY WERE PROPERLY PAYABLE UNDER SECTION 4401

A. Unless The Checks Contained Unauthorized Signatures, Discrepancies, Improper Charges, Or Alterations, They Were Properly Payable And Chargeable To Carson Fischer's Account

In its Order granting leave to appeal, this Court directed the parties to brief the question, "if the checks did not contain an 'alteration,' whether they were therefore *properly payable* under MCL 440.4401(1)." Section 4401(1) provides as follows:

> A bank may charge against the account of a customer an item that is properly payable from that account even though the charge creates an overdraft. An item is properly payable if it is authorized by the customer and is in accordance with any agreement between the customer and bank.

Conversely, a bank may not charge the customer's account for an item that is not "properly payable." *See e.g., Pamar Enterprises, Inc v Huntington Banks of Mich*, 228 Mich App 727, 735; 580 NW2d 11 (1998). Section 4401, Comment 1, provides that "an item is properly payable from a customer's account if the customer has authorized the payment. ...An item containing a forged drawer's signature or a forged endorsement is not properly payable." As White and Summers make clear, § 4401 instructs when a bank may or may not charge a customer's account:

> Whether an item is properly payable is the crucial question in a variety of conflicts between customer and bank. Translated into practical terms, if a court finds that an item is properly payable, the bank is entitled to charge the depositor's account; conversely, if a court finds that an item is not properly payable, the bank may not charge the customer's account, and if it has done so, it must recredit the account.

White & Summers, Uniform Commercial Code (4th ed), §21-3, pp 362-363 (cites omitted).

This is a customer claim of improper payment of checks against its payor bank. A bank may charge against its customer's account an item that is "properly payable." Section 4401(1). The bank is liable for dishonoring items that are properly payable. Section 4402. In its complaint, Carson Fischer alleged that the checks were not "properly" payable because they were presented with forged signatures. Complaint, ¶50. (11a). It also alleged that the "checks or other documents...in reality transferred the Firm's funds to Rasor's own accounts...". Complaint ¶ 35 (9a). It follows that if this is not a case of "unauthorized signature" or forgery of Carson's or Fischer's names to the checks, or if it is not a case of Rasor's unauthorized alteration of the payee to his own personal account, then Carson Fischer authorized the items, and the case is nothing at all. If neither of those circumstances exists, the checks were properly payable. If the checks contain genuine signatures authorizing payment to Michigan National Bank the face of which indicates for Rasor's personal account, then Carson Fischer has authorized the payment, and there is no basis to recredit Carson Fischer's account.

Under the Code's rules for determining a payee, the payee of a check drawn to the order of an account number is the owner of the account, § 3110(3). Thus, the checks as presented to the Bank, were payable to Rasor's account number, and were (if not altered), properly payable to Rasor as the owner of the account number. If Carson or Fischer actually signed the checks while they were payable to Rasor's account number, then the checks were properly paid.[16]

[16] If Carson or Fischer actually signed the checks while they were payable only to Michigan National Bank, but Rasor added his account numbers and altered the payee, then there

B. The Lack Of Rasor's Signature Did Not Render The Checks Not "Properly Payable"

The lack of Rasor's endorsement on the checks is irrelevant to the analysis. *First Nat'l Bank of Gwinnett v Barrett,* 141 Ga App 161; 233 SE2d 24 (1977). In some circumstances, courts have found that a check, not endorsed by the payee, is not properly payable. Where a check is payable to a bank account number, however, if the check is taken by the depositary bank for collection, the bank may become a holder without an endorsement. *See* Uniform Commercial Code Commentary to § 3110, describing checks payable to an account number: "... under section 4-205(a), if the check is taken by a depository bank for collection, the bank may become a holder without the endorsement."

This is not a case where endorsement makes any difference. Typically, courts find that a check made payable to multiple parties and endorsed by only one is not properly payable. *See, e.g., Pamar Enterprises*, 228 Mich App at 733. However, this factual scenario is not analogous to the case here.

On the other hand, *First Nat'l Bank of Gwinnett v Barrett*, 141 Ga App 161; 233 SE2d 24 (1977), is similar. In *Barrett*, the plaintiff issued a check to Aquatic Industries. *Id.* at 161. Aquatic failed to indorse the check before it was presented to the bank. *Id.* at 162. However, the bank then debited the plaintiff's account for the amount of the check. *Id.* The court held that "the check was properly payable." *Id.* It reasoned that

> [i]t was made payable to the order of a named payee and delivered to the payee. Coinciding with delivery, the check became "properly payable." That characteristic never changed and the payor bank was authorized as against its customer to charge the item to the customer's account. ... Although the check was not negotiated, it was transferred from the payee to the Roswell Bank and by Roswell to the defendant bank. There is not the slightest

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was an alteration, which Carson Fischer failed to discover and report. If Carson or Fischer did not sign the checks, their signatures were forged, and there was an unauthorized signature which Carson Fischer failed to report.

> indication that these transfers were void. The Uniform Commercial Code does not prevent transfers of negotiable order paper without endorsement. ... Indeed, where the holder of an instrument payable to order transfers it for value without indorsing it, the transfer vests in the transferee all the title that the transferor had in the paper. The check was payable to the order of Aquatic by plaintiffs' specific instructions. The Roswell Bank paid the check to Aquatic, the party to whom payment was intended to be made, and when it was presented to the payee bank it was properly payable out of funds plaintiffs had on deposit.

Id. (citations omitted); *see also Mustin v Citizens & Southern Nat'l Bank*, 168 Ga App 549; 309 SE2d 822 (1983) (following *Barrett*). Under *Barrett*, *once* the check payable to Rasor's account was presented by him at the bank, it was properly payable.

In addition, other courts have noted that lack of endorsement is no basis to entitle a customer to recovery. A customer may not recover merely because a bank pays on a check that was not indorsed. *See, e.g.*, *Issac v American Heritage Bank & Trust Co*, 675 P 2d 742 (Colo, 1984). The court there held that "[t]o warrant the recovery of damages, there must be both a right of action for a wrong inflicted by the defendant and damage resulting to the plaintiff therefrom." *Id.* at 744 (quoting 22 Am Jur 2d, Damages, § 2 (1965)). The Supreme Court of Colorado held that there is a causation requirement in the "properly payable" analysis: "It is fundamental that the claimant must ... establish that the loss was caused by the party being sued." *Id.* at 745.

C. The Insertion Of The Rasor Personal Account Number On The Face Of The Checks, If Not An "Alteration," Did Not Render The Checks Not "Properly Payable"

As noted above, the addition of Rasor's account number is an alteration of the payee. We mention this again only because Carson Fischer has argued previously that this number added to the "memo" line does not change the payee; its argument simply contravenes the rules set forth in § 3110(3). But in any event, if that insertion is not an alteration, its presence on the face of the check does not render the check not properly payable.

IV. TO THE EXTENT THAT THE COURT OF APPEALS RELIED UPON THE COMMON LAW DUTY OF INQUIRY SET FORTH IN *ALLIS CHALMERS LEASING*, THAT DUTY DOES NOT OVERRIDE OR AVOID SECTION 4406(6)'S AND THE ACCOUNT AGREEMENT'S PRECLUSION EFFECT

The Court of Appeals effectively held that *Allis Chalmers Leasing v Byron Center State Bank*, 129 Mich App 602; 341 NW2d 837 (1983), in combination with § 4401, provides an independent claim of "strict liability" that is not subject to the preclusion effect of § 4406(6) or the Account Agreement here. (333a-335a). This holding errs in law.

Allis Chalmers is readily distinguishable from this case on its facts. In *Allis Chalmers* a cashier's check was drawn by Allis Chalmers and made payable to Byron Center Bank; there is no indication that Allis Chalmers had an account at the bank or was otherwise its customer. Moreover, the one-time check in *Allis Chalmers* was not made payable to an account. Further, the party who presented the check to the bank was not its drawer-customer or drawer-customer's representative. Further, *Allis Chalmers* did not involve a situation where a bank customer, such as Carson Fischer, received monthly statements and canceled checks without objection. The question of the application of § 4406(6) is not raised or even discussed.

Here, the payee on the checks was the bank for Rasor's personal account number, not merely "Michigan National Bank." Under the rules of § 3110(3), the payee was the owner of the numbered account, i.e., Rasor. The check was presented by the customer's authorized representative. Thus, the situation giving rise to the "common law rule" applicable to the situation where the bank is the payee does not even arise.

Even if *Allis Chalmers* were not readily distinguished on its facts, its holding could not govern here. The Official Comment to Code § 1103 provides:

> [W]hile principles of common law and equity may *supplement* provisions of the Uniform Commercial Code, they may not be used to *supplant* its provisions, or the purposes and policies those provisions reflect, unless a specific provision of the Uniform Commercial Code provides otherwise. In the absence of such a provision, the Uniform Commercial Code preempts principles of common law

> and equity that are inconsistent with either its provisions or its purposes and policies.

UCC § 1103, Official Comment 2 (emphasis in the original). *Allis Chalmers* was decided in 1983, before the current version of § 4406(6) was enacted in 1993. Instead, Part 4 of Article 4, including § 4406(6), defines the obligations of Michigan National and Carson Fischer in these transactions.

The common law duty of inquiry articulated in *Allis Chalmers* is a duty of care. Section 4406(6), on the other hand, is a preclusion defense that applies "without regard to care or lack of care of either the customer *or the bank.*" It must therefore apply even in circumstances where a bank has allegedly failed in its duty to exercise care; otherwise, the words of § 4406(6) are superfluous. Thus, as *Siecinski* makes clear, § 4406(6) applies to preclude all types of claims for wrongful payment, statutory or otherwise. In *Siecinski*, the plaintiff argued that the § 4406(6) notification period should not be applied to her negligence and conversion claims. The *Siecinski* Court rejected the argument, stating:

> The language of the subsection does not restrict its application to any particular cause of action. It provides, generally, that a customer's failure to report an unauthorized signature within one year after a statement of account is made available to the customer precludes the customer from asserting the unauthorized signature against the bank. *We conclude that the unauthorized signature may not, after one year, be asserted against the bank in any type of action, including a negligence action.*

Siecinski, 209 Mich App at 464-5 (emphasis added; citation omitted).

To the extent that the Court of Appeals relies on *Allis Chalmers* to conclude that Carson Fischer may recover from Michigan National, it erred in its failure to recognize that under *Siecinski*, § 4406(6), which applies to bar statutory claims to recredit account for failure to give notice, applies with equal force to common law claims for improper payment.

CONCLUSION

For the foregoing reasons, this Court should reverse Part I, pages 3-5, of the Court of Appeals February 8, 2005 Opinion in Appeals Docket 248167, and reinstate the order and judgment of the Circuit Court dated November 27, 2002 (3304a-310a).

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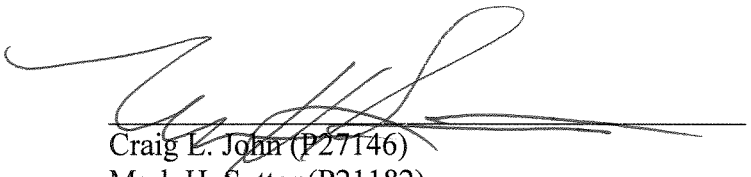

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